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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES D. KROL

Appeal 2008-1794
Application 10/692,857
Technology Center 1700

Decided: October 29, 2008

Before CHUNG K. PAK, LINDA M. GAUDETTE, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant requests reconsideration of our Decision of May 28, 2008 (“Decision”) wherein we sustained the Examiner’s rejections of the appealed claims under 35 U.S.C. § 103(a). Appellant contends that “the Board erred in (1) construing the claim language of independent claims 1, 11, 16 and 22, and (2) determining that the Examiner met his burden of making a prima facie case of obviousness based on the applied art.” (Request for Rehearing “Request” 2.)

We have reviewed our Decision in light of the arguments presented by Appellant in the Request. However, we are not persuaded that our Decision was in error.

Turning first to the issue of claim interpretation, Appellant contends that the Board incorrectly interpreted the claim term “being,” as used to define the base layer in claims 1 and 11, as an open term, similar to the claim term “comprising.” (Request 3.) Appellant maintains that the term “being” is “a closed term meaning ‘is,’ [] thus, precluding any additional components in the base layer other than the dry formulated flour and cheese mixture.” (Request 3.) Appellant thus contends that the Board erred in interpreting claims 1 and 11 as open to include additional, unrecited components in the base layer. (Request 4.)

Appellant presents a similar argument in connection with method claims 16 and 22. Appellant notes that these claims require a first step of “preparing a formulated flour, wherein the formulated flour is a dry mixture,” i.e., a base layer. (Request 4-5.) According to Appellant, the “sequence of steps [recited in each of claims 16 and 22] requires that the base layer remain dry and that additional components cannot be added to the base layer in a liquid form.” (Request 8.) Appellant thus contends that the Board erred in interpreting claims 16 and 22 as open to include additional, unrecited steps in which additional components are added to the formulated flour to form the base layer. (Request 4.)

Non-conventional transitional phrases (i.e., other than “comprising,” “consisting essentially of,” and “consisting”) are interpreted in light of the Specification to determine whether open or closed claim language is intended. *See, e.g., AFG Industries, Inc. v. Cardinal IG Company*, 239 F.3d

1239, 1245 (Fed. Cir. 2001) (interpreting “composed of” in same manner as “consisting essentially of” based on Specification and other evidence); *Crystal Semiconductor Corp. v. TriTech Microelectronics Int’l Inc.*, 246 F.3d 1336, 1348 (Fed. Cir. 2001) (noting that the term “having” in transitional phrase “does not create a presumption that the body of the claim is open”); *Lampi Corp. v. American Power Products Inc.*, 228 F.3d 1365, 1376 (Fed. Cir. 2000) (interpreting “having” as open terminology, allowing the inclusion of other components in addition to those recited).

It is clear from the Decision that we interpreted claims 1, 11, 16, and 22 in light of the Specification. (*See* Decision 5-9.) Appellant has not explained why our claim interpretation is inconsistent with the Specification. Nor has Appellant cited relevant case law to support the contention that the terms “being” and “is,” as used in the context of the claims, are properly construed as closed terminology precluding subsequent modification of the initial, dry mixture.

We now turn to Appellant’s contention that the Board erred in “determining that the Examiner met his burden of making a prima facie case of obviousness based on the applied art.” 37 C.F.R. § 41.52(a)(1) states that a “request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board in its Decision.” In the Request, Appellant does nothing more than reiterate the same arguments in support of nonobviousness relied upon in the original Appeal and Reply Briefs. Presumably, Appellant is requesting reconsideration of these arguments in light of their proposed claim construction. As Appellant has not persuaded us of error in our claim interpretation, we need not reconsider our decision to sustain the prior art rejections.

In conclusion, based on the foregoing, we have granted Appellant's request to the extent that we have reconsidered our decision, but we deny Appellant's request to make any change therein.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

DENIED

PL Initial:
Sld

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